

LECs must have an equal opportunity to apply for new PCS spectrum. Full utilization of spectrum-based access methods will enable LECs to offer services in the most cost-effective method while improving service quality. Not surprisingly, then, the initial comments evidence a wide belief that unrestricted LEC eligibility for PCS will further promote universality, speed of deployment, diversity of services, and competitive delivery.<sup>50</sup>

LEC participation likely "will produce a broader access to and acceptance of PCS."<sup>51</sup> LECs already have a presence in every region of the United States, making it relatively easy for them to deploy low-cost, widely available PCS offerings, using their existing infrastructures.<sup>52</sup> Moreover, LECs will be able to utilize their resources and expertise to facilitate the rapid introduction of PCS.<sup>53</sup> It is well-recognized that "LECs are proven telecommunications providers who have the technical expertise, management experience, and financial stability,"<sup>54</sup> as well as the public

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at 1-2; SCTA at 5-8; SNETCO at 3-4, 5-6; TDS at 13-22; Telmarc Telecommunications, Inc. ("Telmarc") at 28-34; USSBA at 21-23; USTA at 8-16; U S West, Inc. at 22-24; UTC at 33-34.

<sup>50</sup> BellSouth at 49-55; CBT at 3; NYNEX at 8-16; PacTel at 10-14; U S West, Inc. at 22.

<sup>51</sup> PacTel at 12.

<sup>52</sup> Indeed, the Commission recognized this fact in granting LECs eligibility for cellular licenses. See Cellular Communications Systems, 86 F.C.C.2d 469 (1981).

<sup>53</sup> Home at 4; NYNEX at 11-12; PacTel at 11-12; Palmetto at 4.

<sup>54</sup> NYNEX at 11-12.

service commitment, to deploy PCS networks effectively and efficiently throughout the nation. Indeed, "[e]xchange carrier participation in this docket and in PCS trials evidence the fact that they would vigorously deploy PCS in their service areas to provide expanded and improved service offerings to their customers."<sup>55</sup>

Participation by LECs in the "deployment of PCS enhance[s] these carriers' ability to support all PCS providers' needs and facilitate the interoperability of different PCS systems"<sup>56</sup> by increasing the capability and efficiency of the public switched network. In addition, allowing LECs access to new spectrum has the capability to improve local exchange service. It is essential that LECs not be precluded from using new technologies in providing local exchange service most effectively to their subscribers and permitting them to meet their universal service obligations. Barring LECs from an equal opportunity to use new spectrum could foreclose them from serving their existing market.<sup>57</sup>

Ensuring LEC access to new spectrum is particularly important in light of the increased competition facing the local exchange marketplace. LECs

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<sup>55</sup> USTA at 15.

<sup>56</sup> Home at 4; see also Palmetto at 4.

<sup>57</sup> Any concerns about possible anticompetitive effects can be more effectively addressed through other mechanisms, such as imposing reasonable interconnection requirements.

necessarily "must have the tools needed to build a competitive network that will meet the needs of customers in years ahead."<sup>58</sup> Otherwise, should the LECs not be allowed to incorporate the use of spectrum into their networks, the Commission may witness an unintended diversion in the progression of LEC network improvements that have historically benefitted the public. Such actions could result in a less reliable and less capable network -- a LEC network that will not be able to meet the needs of its customers. This situation would have serious repercussions at any time, but when it occurs during a period of increasing competition in the local exchange marketplace, this further imbalance among the competitors could accelerate the injury to the LEC network and prompt an "uneconomic" migration of traffic that would not take place if all competitors were treated in a fair manner.<sup>59</sup>

In summary, "the development of PCS is both too important and too nascent to exclude or reduce the participation of any qualified competitor -- especially competitors offering the expertise and economies of integration provided by local exchange carriers."<sup>60</sup> Thus, the FCC should adopt its

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<sup>58</sup> U S West, Inc. at 31.

<sup>59</sup> See Penn. PUC at 11 ("PCS . . . could siphon off, in toto, LEC customers from low-cost, high return areas, and would wreck havoc on the established wirebased network.").

<sup>60</sup> Bell Atlantic at 14 (emphasis in original).

tentative conclusion to find all LECs eligible for full and unrestricted PCS spectrum licenses.<sup>61</sup>

C. The Office Of Plans And Policy Paper Provides Compelling New Evidence That GTE's Recommendations Should Be Pursued.

Soon after the opening comments in this proceeding were filed, the Office of Plans and Policy -- the Commission's own policy experts -- released an important and significant study strongly supporting a number of GTE's recommendations.<sup>62</sup> In particular, the OPP Paper recommends that the Commission: authorize the maximum number of PCS licenses with 20 MHz each; permit cellular carriers to participate in PCS without geographic limitations; and allow local telephone companies full eligibility to provide PCS. As discussed below, the findings in the OPP Paper are supported by detailed analyses of the cost structure of providing PCS to the public.

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<sup>61</sup> If the Commission adopts any restriction on LEC eligibility to apply for in-region PCS authorizations, that limitation should not extend to entities with less than a controlling interest in the subject LEC. See note 46, supra.

<sup>62</sup> D. Reed, Putting It All Together: The Cost Structure of Personal Communications Services (Office of Plans and Policy, Nov. 10, 1992) ("OPP Paper").

1. The OPP Paper supports licensing the highest number of 20 MHz PCS providers.

The OPP Paper concludes that there is no justification for limiting the number of licenses due to characteristics of the PCS cost function.<sup>63</sup> By modelling PCS cost characteristics of several deployment scenarios, the OPP Paper found that, at a market penetration level of 30 percent, the difference in total annualized costs between one supplier and six suppliers -- using the telephone network for switching and transport -- would be only about \$10 per month per subscriber.<sup>64</sup> Indeed, the OPP Paper determined that the economies of scale for a PCS network are largely exhausted at penetration rates above 10 or 20 percent.<sup>65</sup> This means that all licensees will be able to achieve maximal economies of scale even in a PCS market shared among a large number of licenses.

The findings of the OPP Paper also agree with GTE's argument that allocating spectrum for more PCS providers, and, thus, establishing greater

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<sup>63</sup> Id. at 51.

<sup>64</sup> Id.

<sup>65</sup> Id. at 49. "[T]he economies of scale for a PCS network appear to be largely exhausted above a 20 percent penetration rate . . . . When the economies of scope between PCS and existing services are considered, the economies of scale for a PCS network are mostly exhausted above penetration rates of 10 percent." Id. The OPP Paper also notes that because the cost model assumes a PCS network with microcells smaller than 1.6 kilometers -- and thus very high fixed costs -- the penetration levels at which economies of scale are exhausted for a macrocell PCS network should be even lower. Id.

competition, will ultimately benefit consumers.<sup>66</sup> Licensing many providers allows market forces to decide the appropriate number of systems, acts as a "market check" on prices and services, and spurs innovation.<sup>67</sup> Creating such a robust, competitive environment furthers OPP's stated policy objectives of minimizing delay in the deployment of PCS, hastening the development of PCS infrastructure, and fully exploiting economies of scope by allowing entry of firms with switching and transport infrastructure.<sup>68</sup> The OPP Paper, therefore, concludes that "policy objectives are best satisfied by the licensing option that provides the highest number of suppliers while still providing at least 20 MHz to each provider . . . . [L]icensing options that include five or six 20 MHz PCS licenses would appear to be the most attractive."<sup>69</sup>

The OPP Paper, thus, is in accord with GTE's contention that 20 MHz is the proper allocation of spectrum for each PCS system. Although many

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<sup>66</sup> See id. at 45-46, 52. As the OPP Paper points out, this is true even if PCS penetration levels turn out much lower than expected and the market is forced to consolidate. Id. at 52.

<sup>67</sup> Id.

<sup>68</sup> Id. at 53.

<sup>69</sup> Id. at 54-55. The OPP Paper contemplates the possibility of allowing licensees to acquire up to a total of 40 MHz spectrum in a given market. Id. at 55. If the Commission adopts this concept and applies it to all wireless service providers, the cap should be increased to 45 MHz in recognition of the fact that cellular allocations are 25 MHz. Other providers of competing wireless services, such as ESMR operators, should also be governed by this ground rule.

parties have argued that the cost of providing service decreases as the size of the spectrum allocation increases, OPP's study demonstrates that 20 MHz will enable providers to deliver low-cost PCS to consumers and that allocations in excess of 20 MHz do not significantly lower system costs. Therefore, the cost structure of PCS does not justify additional spectrum beyond 20 MHz.<sup>70</sup>

2. The OPP Paper supports cellular operator participation in PCS without geographic limitations.

The OPP Paper substantiates GTE's determination that eligibility restrictions placed on cellular companies will result in the loss of production efficiencies, which will make provision of PCS to the public more expensive.<sup>71</sup> According to OPP's cost model, "the strong economies of scope found between PCS and . . . cellular service[] demonstrate that consumers could benefit from allowing these companies to hold PCS licenses."<sup>72</sup> The OPP Paper identifies many network elements where economies of scope exist, including switching, backhaul, cell site, and handset costs.<sup>73</sup> Cellular operators can use existing equipment to lower

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<sup>70</sup> Id. at 53-54.

<sup>71</sup> See id. at 56, 3-4.

<sup>72</sup> Id. at 56.

<sup>73</sup> Id. at 39.

the incremental costs of entering the PCS market.<sup>74</sup> The study recognizes that cellular operators are positioned to deploy PCS service rapidly, thereby furthering OPP's policy goals of minimizing unnecessary delays in the provision of service and facilitating development of an efficient infrastructure.<sup>75</sup>

Furthermore, the OPP Paper concurs in GTE's contention that fears of anticompetitive behavior by cellular operators are unjustified. OPP found that, because of the similarities between cellular and PCS, cellular operators will deploy PCS systems as aggressively as other licensees. The OPP Paper states that "[t]he competitive threat of PCS will spur cellular carriers to reasonably match the services and features offered by PCS providers."<sup>76</sup> Moreover, the OPP cost model found that "the weak economies of scale in the cost function indicate that it is highly unlikely that one or two firms would dominate the market due to any cost characteristics of the market."<sup>77</sup>

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<sup>74</sup> Id. at 43. Indeed, the economy of scale achieved is even greater than the OPP Paper states. Because the cost model ignores the economies of scope between switching, backhaul and antenna sites, the policy conclusions underestimate the extent to which cellular operators' provision of PCS can change the cost structure for PCS, using existing infrastructure so that fixed costs are exchanged for variable costs. See id. at 43.

<sup>75</sup> See id. at 46.

<sup>76</sup> Id. at 40.

<sup>77</sup> Id. at 56.



Finally, the OPP Paper corroborates GTE's assertion that cellular carriers' existing 25 MHz allocation is insufficient for the delivery of both cellular service and PCS.<sup>78</sup> As the OPP Paper makes clear, cellular operators cannot provide low-cost PCS service if they must employ expensive radio systems that operate within a small spectrum block.<sup>79</sup> Moreover, the OPP's study acknowledges that an allocation of spectrum in the 2 GHz band will enable cellular operators to take advantage of that band's natural propagation characteristics, and to manage the transition to digital transmission.<sup>80</sup>

3. The OPP Paper supports full eligibility for local telephone company participation in PCS.

The OPP Paper demonstrates that substantial economies of scope exist between telephone networks and PCS, including switching, transmission, network signalling and intelligence nodes, in addition to billing, administrative, and network maintenance services.<sup>81</sup> These economies will

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<sup>78</sup> See id. at 41-43.

<sup>79</sup> Id.

<sup>80</sup> Id. at 58. GTE does not endorse certain recommendations made in the OPP Paper without support in the cost model. For example, in support of the conclusion that cellular operators should be limited to 10 MHz of 2 GHz spectrum, the Paper states that cellular operators "enjoy a first mover advantage to PCS markets." Id.; see also id. at 57. This "first mover advantage" is not discussed or analyzed in the cost model, and, thus, stands as an unsupported conclusion.

<sup>81</sup> Id. at 29-30.

lower the initial costs of deploying PCS and encourage the participation of smaller providers that can utilize existing infrastructure.<sup>82</sup> Results of OPP's model affirm GTE's position that consumers will benefit by allowing local telephone companies to hold PCS licenses, and anticompetitive concerns can be addressed through safeguards.<sup>83</sup> Indeed, the OPP Paper states that "this analysis shows that substantial benefits could be realized by allowing [telephone companies] to offer PCS on an integrated basis with telephone service."<sup>84</sup>

As with cellular providers, OPP found that the costs of restricting telephone participation in PCS would be the loss of production efficiencies and delay in the development of the infrastructure necessary to support PCS.<sup>85</sup> This development in turn would increase the cost of PCS infrastructure.<sup>86</sup>

In summary, the conclusions announced in the OPP Paper substantially support recommendations made by GTE and others that the Commission should authorize a maximum number of 20 MHz PCS licenses, and ensure the participation of cellular and local telephone companies in the

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<sup>82</sup> Id. at vii, 29.

<sup>83</sup> Id. at 56.

<sup>84</sup> Id.

<sup>85</sup> Id. at 60.

<sup>86</sup> See id.; id. at 3.

provision of PCS. As the carefully-reasoned work product of the Commission's own staff, the OPP Paper is the benchmark against which other comments should be measured. Accordingly, the Commission should take full advantage of its staff's study and recommendations.

**II. THE COMMENTS SHOW THAT THE COMMISSION'S PCS GOALS WILL BE BEST SERVED BY LICENSING BASED ON THE CELLULAR SERVICE BOUNDARIES.**

**A. The Comments Provide Overwhelming Support For Service Areas Based On The Cellular Market Boundaries.**

Numerous parties commenting in this proceeding concur with GTE that PCS service areas should be conformed to the existing Metropolitan Statistical Area ("MSA") and Rural Service Area ("RSA") definitions used in cellular licensing in order to maximize the competitive delivery and diversification of PCS services.<sup>87</sup> The advantages of smaller service areas have been well-documented. They create significant entry opportunities for

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<sup>87</sup> Commenting parties supporting the licensing of MSA/RSA service areas include Alltel at 12-15; AMTA at 7-9; BellSouth at 30-35; McCaw at 14-18; Centel at 11-12; Century Cellunet, Inc. at 10; Chesnee at 1; CBT at 15-16; CSI at 2-3; CTIA at 34-57; Fleet Call at 5-7; NYNEX at 22-24; Palmetto at 2-3; Rochester at 16-18; Rural Cellular Corporation at 2; SWB at 20-22; Piedmont at 2; Sprint at 3-7; DOJ at 19-23; USTA at 20-22; Vanguard at 11-12; Viacom International, Inc. ("Viacom") at 17-18.

new and varied offerings,<sup>88</sup> thus, furthering the Commission's stated goal of diversity of service.

Moreover, as many parties have observed, MSA/RSA licensing is well-suited to the highly localized nature of 2 GHz PCS operations.<sup>89</sup> PCS employs microcellular rather than macrocellular technology. At 2 GHz, cell site radii are smaller than at 800 MHz at a given power level.<sup>90</sup> As GTE has explained, the high traffic requirements of PCS also favor small cell sites to increase spectrum re-use and maximize capacity.<sup>91</sup> These and other technical factors suggest that 2 GHz PCS is likely to operate over smaller areas than cellular services.<sup>92</sup>

Many commenting parties point out that, because MSAs and RSAs are well-known, defined boundaries, licensing of PCS on such a basis could

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<sup>88</sup> See, e.g., McCaw at 15; BellSouth at 31-32; Centel at 12; CBT at 16; CSI at 3-4 (noting that smaller-sized licensing areas will facilitate entry by small and medium sized companies); CTIA at 34-57 (stating that use of MSAs/RSAs will promote FCC's goals of speed of PCS deployment, universality of service, diversity of service, and competitive delivery); Fleet Call at 6-7; Palmetto at 2-3.

<sup>89</sup> See, e.g., BellSouth at 30-32; Centel at 12; Century Cellunet at 11-12; CSI at 4; McCaw at 13-14; NYNEX at 23-24.

<sup>90</sup> GTE Comments at 33.

<sup>91</sup> Id.

<sup>92</sup> See, e.g., Century Cellunet at 11; McCaw at 14 (noting that factors such as the costs of deploying the densely packed infrastructure required by 2 GHz PCS and the number of hand-offs required in a microcellular system at highway speeds dictate smaller operating areas, high concentration in urban areas, and no expansion to areas extending beyond population centers).

proceed rapidly and without confusion.<sup>93</sup> Moreover, the smaller licensing areas of MSAs and RSAs will minimize spectrum inefficiency.<sup>94</sup> Overall, there is widespread agreement that the benefits of utilizing a licensing scheme that is well-established and well-understood far outweigh the theoretical concerns raised in the Notice.<sup>95</sup>

In contrast, the comments overwhelmingly reject licensing larger service areas for PCS. A national licensing scheme has been called the "worst possible choice of all proposed options,"<sup>96</sup> and has been widely rejected as precluding entry opportunities, promoting inefficient use of spectrum, and delaying deployment of service, particularly to less densely populated areas within larger markets.<sup>97</sup> Moreover, "[a]uthorizing a limited

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<sup>93</sup> E.g., AMTA at 7-9; BellSouth at 30-31; Centel at 11; Century Cellunet, Inc. at 10; CBT at 16; Rochester at 18; Rural Cellular Corporation at 2; USTA at 21; Vanguard at 11-12; Viacom at 17.

<sup>94</sup> See, e.g., McCaw at 17.

<sup>95</sup> As GTE noted in its opening comments, if the Commission embraces a licensing scheme that begins with smaller license areas, the "market" can determine consolidation of coverage area. Such an approach is preferable to allowing unused spectrum assigned to a large area licensee to lie fallow until further Commission proceedings. See also Alltel at 13-14; BellSouth at 35; Century Cellunet at 11; Sprint at 6-7; NYNEX at 22-24 (reiterating that PCS is a local service and that consolidation of markets can occur as the need arises); DOJ at 21 (stating that if the license areas established by the Commission are too small to realize economies of scale, market forces may produce consolidations to correct the situation).

<sup>96</sup> McCaw at 18.

<sup>97</sup> See, e.g., Alltel at 15; AMTA at 8-9; BellSouth at 37-39; CTIA at 51-52; Florida Cellular at 7-8; McCaw at 18-19; SWB at 22-23; DOJ at 21; Viacom at 17-18; Vanguard at 12-13.

number of ubiquitous nationwide licensees would . . . sacrifice the many benefits of broader and more diverse participation, including promoting greater innovation in service and technology."<sup>98</sup> Additionally, a nationwide licensee would "certainly have a reduced incentive to participate in any standards-setting process in order to establish a common air interface for PCS."<sup>99</sup> Lastly, nationwide licenses, even if open to consortium-based providers, would limit participation to only a few deep-pocketed participants.

Major Trading Areas ("MTAs"), Basic Trading Areas ("BTAs"), and Local Access and Transport Areas ("LATAs") are also disfavored by many of the commenting parties. For example, many parties state that both MTAs and BTAs are unwieldy in size and are designed for purposes unrelated to PCS. They contend that licensing PCS on the basis of MTAs or BTAs would thwart the Commission's goals of rapid deployment of PCS and universal service.<sup>100</sup> Parties cite severe restrictions on entry opportunities, problems of spectrum warehousing, and neglect of local community needs as some of the potential consequences of the adoption of such schemes.<sup>101</sup>

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<sup>98</sup> Vanguard at 13.

<sup>99</sup> USTA at 21.

<sup>100</sup> E.g., CTIA at 40-50; McCaw at 19-20; NTIA at 20; Vanguard at 10-11.

<sup>101</sup> CTIA at 50; McCaw at 19.

Similarly, LATAs are criticized as an inappropriate model for PCS licensing. Many parties note that LATA boundaries were originally drawn to address concerns associated with asset divestiture and transfer unrelated to wireless communications services. Thus, such boundaries have little relevance to defining the appropriate service areas for PCS.<sup>102</sup>

More generally, parties note that larger geographic areas may result in delaying or denying service to smaller communities as licensees focus on more densely-populated areas within larger markets.<sup>103</sup> As a result, there may be a decrease in product and service innovation, possibly leading to the delivery of lower-quality service.<sup>104</sup> Moreover, some have agreed with GTE that licensing larger regional areas "would uniquely benefit parties that have large concentrations of investment and infrastructure within those areas."<sup>105</sup>

The record reflects a clear preference for licensing PCS on the basis of the MSA/RSA service areas in effect for cellular licensing. While nationwide licensing, MTAs, BTAs, and LATAs all suffer from severe infirmities, MSAs and RSAs offer broad participation of providers, diverse services,

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<sup>102</sup> CTIA at 44; NTIA at 18; McCaw at 21; Rochester at 17; SWB at 23-24; Sprint at 8.

<sup>103</sup> See, e.g., NTIA at 18-20; Sprint at 8; DOJ at 22-23; USTA at 21; Vanguard at 12.

<sup>104</sup> Sprint at 8.

<sup>105</sup> GTE Comments at 35 n.32; see also McCaw at 21.

competitive delivery, and the administrative ease and convenience of a well-established, well-recognized licensing scheme that meshes well with the microcellular characteristics of PCS. Based on its own analysis, and the comments of numerous other interested parties, GTE reiterates that the Commission should look no further than the scheme that it has already successfully employed in the cellular context for licensing new Personal Communications Services.<sup>106</sup>

**B. MCI's National Consortium Proposal Is Ill-Conceived And Inconsistent With The Commission's PCS Goals.**

In stark contrast to the large majority of commenters, MCI advocates a national "consortium" scheme for PCS licensing. While MCI's consortium approach differs in some respects from other national proposals, it nonetheless fails to realize the public interest benefits of MSA/RSA licensing. Indeed, closer inspection reveals that the consortium plan is exclusionary, sacrifices the purported benefits of national licensing, and uses government regulatory intervention to compensate for severely-reduced marketplace competition. GTE consequently believes that MCI's approach to national licensing is fundamentally flawed and inconsistent with the Commission's stated goals for PCS.

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<sup>106</sup> The MSA/RSA boundaries also have been used in licensing Interactive Video and Data Service systems. Interactive Video and Data Services, 7 FCC Rcd 1630, 1638 (1992).



As an initial matter, by recommending restrictive comparative criteria, MCI's proposal effectively excludes virtually all of the most experienced and qualified entities as potential "major participants" in a consortium.<sup>107</sup> MCI's proposal, for example, practically renders ineligible independent cellular carriers, local exchange companies, and the country's two other largest interexchange carriers.<sup>108</sup> These are precisely the entities that possess the financial resources and "technical expertise to perform necessary support functions for a national PCS system."<sup>109</sup>

Furthermore, government-mandated national consortia are neither justified nor will they "reap the advantages of both national licensing and local participation."<sup>110</sup> The cellular experience has shown that the market can be relied upon to achieve consolidation where warranted by efficiencies or economies.<sup>111</sup> MCI's proposal effectively preempts the operation of market forces in favor of government regulation, justified on the basis of arguments that are illusory or unsupported:

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<sup>107</sup> MCI's approach appears to rely on a "technically sophisticated national entity," also referred to as the "major participant," to drive consortium standards. MCI at 8.

<sup>108</sup> *Id.* at 17.

<sup>109</sup> *Id.* at 9.

<sup>110</sup> *Id.* at 13.

<sup>111</sup> GTE Comments at 34.

First, licensing through national consortia is not likely to increase speed of deployment. Given the perceived value of a "national" PCS franchise, the expectation that there will only be a few applicants for consortium licenses is unjustifiably optimistic and fails to recognize the level of speculation in recent mobile services licensing.<sup>112</sup> In addition, the Commission will be required to comparatively evaluate each participant in the national consortium, not simply the consortium itself as MCI suggests.<sup>113</sup> Furthermore, because of the potential value of a national consortium license, serious applicants are likely to dedicate significant financial, technical, and legal resources to pursuing such licenses, resulting in a "no-holds-barred" struggle of titanic proportions. Such proceedings are likely to be ultimately resolved in the Court of Appeals, after consuming vast amounts of time, Commission resources, and attorney fees.

Second, licensing a national consortium is no guarantee that ubiquitous national service actually will be deployed. Indeed, MCI has recognized that a consortium may not be able to identify all "local operators"

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<sup>112</sup> MCI at 14.

<sup>113</sup> Id.; Aeronautical Radio Inc. v. FCC, 928 F.2d 428, 452 (D.C. Cir. 1991). The cellular experience also has demonstrated that licensees with numerous minority partners are often prone to disputes, ultimately delaying service to the public. The rules of the Commission adopted pursuant to the Anti-Drug Abuse Act of 1988, 21 U.S.C. § 862(a) (Supp. III 1992), require consideration of not only each participant, but also the officers and directors of each participant. Amendment of Part 1 of the Commission's Rules To Implement Section 5301 of the Anti-Drug Abuse Act of 1988, 6 FCC Rcd 7551, 7553 app. A (1991) (to be codified at 47 C.F.R. § 1.2002).

and equity owners at the time of licensing.<sup>114</sup> Under this scenario, ubiquitous service may never result because it will be difficult to add members to a consortium. Any potential franchisee also is unlikely to consent to be bound by the operational prescriptions of the consortium without any continuing input as to how those rules were developed.<sup>115</sup>

Third, national consortia stymie innovation and diversity of offerings. Indeed, MCI's proposal stands the goal of diversity on its head by limiting service to three particular PCS implementations. Any proposal, in fact, designed to enforce uniformity by fiat must definitionally discourage attempts by local operators to depart from a standardized norm. In effect, MCI's proposal requests government sanction for a single entity to name standards that properly should be forged through competition or industry standards bodies. As a result, the national consortium proposal reduces the promise of PCS to the lowest common denominator of service.

Finally, licensing only three national consortia clearly does not advance competitive delivery of services. Assuming adequate demand, GTE and many other commenters have exhaustively discussed the ability of the market to support at least five competitors and the public interest reasons

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<sup>114</sup> MCI at 16.

<sup>115</sup> A consortium would apparently enforce regulations on the franchisee's purchase of end user equipment, the services to be offered, the sites to be used, the construction plans for the sites, the equipment used at the sites, and long-distance access. Id. at 10-13.

for doing so.<sup>116</sup> Under MCI's proposal, not only will the number of competitors be severely restricted, the competitive flexibility of the "local operators" will be defined by the national entity, further limiting competition.

GTE consequently believes that the national consortium proposal utterly fails to achieve the benefits of MSA/RSA licensing. This approach is unduly-restrictive and preempts the operation of market forces through unnecessary government intervention. In contrast to MSA/RSA licensing, national consortia affirmatively discourage competition and diversity, and it is uncertain whether MCI's proposal would speed deployment or foster ubiquitous service. Accordingly, GTE believes that FCC-mandated "national consortia" would not serve the public interest.

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<sup>116</sup> GTE Comments at 28-32; see also note 141, infra.

III. THE OPENING COMMENTS AND THE RECENT DECISION IN AT&T v. FCC UNDERSCORE THE NEED FOR COMMISSION POLICIES THAT ENSURE REGULATORY PARITY FOR COMPETING SUPPLIERS OF TELECOMMUNICATIONS SERVICES.

A. The Opening Comments Document The Need To Ensure Regulatory Parity.

The opening comments recognize that the decision on the regulatory status of new PCS providers should be consistent with achieving regulatory parity for all telecommunications carriers.<sup>117</sup> As Centel noted, however, "[t]he [NPRM] does not attempt to develop a comprehensive, integrated framework to regulate competing existing and future PCS providers."<sup>118</sup> Rather, the NPRM effectively attempts to treat the regulatory status of new 2 GHz entrants in isolation.

The difference between private carrier and common carrier status is vast. Commenters have catalogued a wide range of regulations that impose greater and more burdensome obligations on common carriers, including, inter alia, state economic regulation, federal Title II obligations regarding

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<sup>117</sup> E.g., Alltel at 16-17; APC at 49; Ameritech at 22-23; Bell Atlantic at 30-31; BellSouth at 65-66; CCI at 35-36; CTIA at 72-77; Centel at 24-26; Century Cellunet, Inc. at 12-13; CBT at 20-21; Ericsson at 27; McCaw at 44-45; Comments of Metrocall of Delaware on Broad Band PCS ("Metrocall") at 18; NRTA/OPASTCO at 18; NTIA at 39-40; NTCA at 11; PacTel at 57; Rural Cellular Corporation at 1; SNETCO at 8-9; SWB at 26-27; Sprint at 18-19; Comments of Telocator on 1850-1990 MHz Personal Communications Services ("Telocator") at 13-14; DOJ at 8-9; USTA at 35; Vanguard at 26-27.

<sup>118</sup> Centel at 24.

service upon reasonable demand and service pricing flexibility, limits on non-domestic investment, applicability of excise taxes, compulsory resale of services, rights of interconnection, licensing fees, forfeiture guidelines, and obligations under the Americans with Disabilities Act.<sup>119</sup> As Bell Atlantic aptly points out, "when technology and regulation confined [private carrier and common carrier] . . . services to rather well-defined and non-competing applications, this disparity in regulatory treatment was not of great importance."<sup>120</sup>

Now, however, these disparities threaten severe distortion to competition. The Notice recognizes that new PCS entrants will compete with cellular carriers, which are regulated as common carriers,<sup>121</sup> but it nonetheless considers regulating new entrants as private carriers without commensurate alterations to the cellular rules.<sup>122</sup> If new PCS providers are regulated as private carriers without changes to the cellular rules, price

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<sup>119</sup> E.g., Ameritech at 22; Centel at 24-26; McCaw at 44-45. Common carriers also have obligations supporting National Security Emergency Preparedness under the Telecommunications Service Priority rules. 47 C.F.R. § 64.401 (1991); 47 C.F.R. § 64.401 app. A (1991).

<sup>120</sup> Bell Atlantic at 30.

<sup>121</sup> NPRM at 5712.

<sup>122</sup> The inadequacy of the NPRM's proposed alterations to the cellular rules was documented by a number of parties. Alltel at 7-8; CTIA at 19-20; Centel at 26-28; GTE at 52-53; McCaw at 45-47; Sprint at 18-19. In addition, as noted by McCaw, the situation is further exacerbated by the potential advent of PCS carriers as a class of "super private carriers" with the interconnection rights of common carriers, but none of the obligations. McCaw at 45.

competition will be artificially limited because the pricing of common carriers' services must reflect the added costs of these more burdensome regulations. In addition, disparate regulations affect the ability of common carriers to introduce new services and respond rapidly to changes in market demands.<sup>123</sup> Common carriers will not have the flexibility to craft adequate competitive responses to new offerings by 2 GHz PCS licensees.

GTE, thus, believes that regulatory parity is critical and that "[t]he rules cannot be skewed to favor some competitors over others."<sup>124</sup> In fact, BellSouth has suggested that "[i]t is legal error to take the approach that the licensee can operate however it wants, and when it operates in an identical manner to other carriers, it need not be subject to the same service rules."<sup>125</sup> Accordingly, "[a] PCS licensee which operates in a manner indistinguishable from a cellular provider should be subject to the same rules and jurisdictional requirements."<sup>126</sup> If new PCS entrants are granted private carrier status, "[a] realignment of cellular's regulatory status with that of PCS would not only be good policy, it would be a legal imperative by

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<sup>123</sup> See, e.g., Alltel at 16 & n.138.

<sup>124</sup> Ameritech at 25.

<sup>125</sup> BellSouth at 65 (citing National Ass'n of Broadcasters v. FCC, 740 F.2d 1190, 1200-05 (D.C. Cir. 1984)).

<sup>126</sup> BellSouth at 65.

operation of statutes and the Equal Protection Clause of the Fifth Amendment."<sup>127</sup>

B. The AT&T v. FCC Decision Reinforces The Need For Prompt And Comprehensive Consideration Of This Problem.

Since the initial comments were filed in this proceeding, the District of Columbia Court of Appeals has issued a ruling in American Telephone and Telegraph v. FCC<sup>128</sup> that underscores the need for prompt and comprehensive consideration of the problem of regulatory parity. In American Telephone and Telegraph v. FCC, the court effectively ruled that the Commission did not have the legal ability to forbear from requiring nondominant common carriers to file tariffs for interstate communications services. As discussed below, this decision adds further, disparate burdens on common carriers offering PCS.

Because private carriers are not subject to any tariffing obligations, American Telephone and Telegraph v. FCC will have an uneven impact on private and common carrier PCS offerings.<sup>129</sup> First, common carriers

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<sup>127</sup> CTIA at 73.

<sup>128</sup> American Tel. & Tel. Co. v. FCC, No. 92-1053 (D.C. Cir. Nov. 13, 1992). The FCC has indicated it will seek rehearing. Tariff Filing Requirements for Interstate Common Carriers, FCC 92-524 (Nov. 25, 1992) (Order).

<sup>129</sup> The decision in American Tel. & Tel. Co. v. FCC will affect the offering of mobile services, including common carrier PCS offerings by existing cellular carriers. PCS systems will originate and terminate interstate calls, and PCS user and signaling networks may



offering PCS could be forced to pass through significant administrative costs required to ensure that tariffs for numerous complex pricing arrangements are filed and maintained accurately, timely, and in the proper form. Second, common carriers' competitive flexibility could be limited by delays in implementing new rates, depending upon how tariff filing obligations are imposed. Finally, as the Court of Appeals recognized, other competitive disparities could arise:

While AT&T had to file all of its rates with the Commission, MCI did not, thus not only making it more difficult for AT&T to match MCI's rates . . . but also enabling MCI and other competitors to entangle AT&T in burdensome proceedings before the Commission by filing oppositions to the rates AT&T filed.<sup>130</sup>

Unless the Commission ensures regulatory parity among all wireless service providers, cost, pricing, and tariffing obligations will be handicaps imposed only on some participants, further threatening the development of full PCS competition.

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extend across state boundaries. Thus, assuming the decision is affirmed on rehearing, common carriers providing PCS will be required by the new decision to file federal tariffs, including access tariffs.

<sup>130</sup> American Tel. & Tel. Co. v. FCC, slip op. at 6 (citations omitted).